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The Constitutionality of California's Public Entity Tort Claim Statutes

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Comments

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Since early statehood California has statutorily required that the victim of a governmental tort file a claim against the responsible public entity within a short period of time after the accrual of his cause of action or risk a complete foreclosure from any subsequent litigation of the claim. No such requirement, other than compliance with the normal statute of limitations, has ever been demanded of victims of private torts. This comment reviews the present status of California's public entity tort claim statutes to determine whether they can withstand a constitutional challenge based on equal protection or due process principles.

Despite the purported abrogation of the common law doctrine of sovereign immunity in California,[1] today the public entity claim requirements[2] frequently achieve one result of that doctrine by impeding the recovery of damages from governmental tortfeasors. This result is effected by the statutes' provision that an individual must normally file a notice of his claim against the government within 100 days after the accrual of his cause of action.[3] When the claimant fails to comply with this requirement, he may be precluded from adjudicating his claim even though the judicial process would have been available to him if a private party had been responsible for his injury.

Although the supreme courts in two states have struck down government tort claim requirements as unconstitutional denials of equal protection of the law or as violations of the due process guarantees of the

1. In 1961 the California Supreme Court declared that the doctrine of governmental immunity from tort "must be discarded as mistaken and unjust." Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961).

2. "There shall be presented in accordance with [sections 900 through 915.4 of the California Government Code] all claims for money or damages against local public entities . . . ." CAL. GOV'T CODE §905. "There shall be presented in accordance with [sections 900 through 915.4 of the California Government Code] all claims for money or damages against the state . . . ." CAL. GOV'T CODE §905.2.

3. CAL. GOV'T CODE §911.2.

fifth and fourteenth amendments to the United States Constitution,[4] California courts have steadfastly refused to accept similar arguments.[5] Because California's public entity claim statutes may also be constitutionally infirm, this comment reviews and examines the equal protection and due process challenges to their validity.

CLAIM PROCEDURE IN CALIFORNIA

The victim of tortious conduct by a public entity or a public employee is faced with an elaborate statutory maze[6] through which he must travel in order to be compensated. One seeking "money or damages"[7] from a government agency must first file a written, verified claim for damages with the appropriate board[8] within either 100 days or one year[9] of the date his cause of action accrues. The claim must contain certain facts,[10] meet specified format requirements,[11] and include an estimate of the claimant's total damages.[12] It must be filed even though the agency has knowledge of the circumstances which gave rise to the claim for damages[13] and has commenced an investigation of the matter.[14] Upon receipt of a timely claim, the defendant

4. Turner v. Staggs, 89 Nev., Adv. Op. 78, 510 P.2d 879 (1973) (equal protection); Reich v. State Hwy. Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972) (equal protection); Grubaugh v. City of St. Johns, 384 Mich. 165, 180 N.W.2d 778 (1970) (due process).

5. In Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 504, 370 P.2d 334, 335, 20 Cal. Rptr. 630, 631 (1962), the California Supreme Court stated, without further elaboration, that it found petitioner's equal protection claim "without merit" since public agencies "generally . . . afford[ed] a proper subject for legislative classification." *Accord*, Tammen v. County of San Diego, 66 Cal. 2d 468, 481, 426 P.2d 753, 761, 58 Cal. Rptr. 249, 257 (1966); Lewis v. City & County of San Francisco, 21 Cal. App. 3d 339, 340-41, 98 Cal. Rptr. 407, 408 (1971); Wadley v. County of Los Angeles, 205 Cal. App. 2d 668, 672-73, 23 Cal. Rptr. 154, 157 (1962).

6. CAL. GOV'T CODE §§900-960.5. For a helpful guide through this tangled web, see O'Brien, *Claims Against California Public Entities and Public Employees*, 43 CAL. S.B.J. 693 (1969); O'Brien, *Suing the Sovereign in Tort*, 43 L.A. BAR BULL. 11 (1967).

7. The claim requirements and related provisions do not apply solely to tort damages. A claim must be filed for *any* "money or damages" from public entities in California, unless the source of the claim comes within the exceptions set forth in sections 905 and 905.2 of the Government Code. For purposes of this comment, however, the claim provisions are discussed as they relate to tort claims.

8. Claims against the state are to be filed with the State Board of Control. Claims against local public entities are to be filed with the governing body of the local public entity. CAL. GOV'T CODE §900.2.

9. Section 911.2 of the California Government Code provides that a claim relating to a cause of action for wrongful death, personal injury, personal property damage, or damage to growing crops must be filed within 100 days of its accrual. Section 911.2 of the California Government Code further provides that claims relating to "any other cause of action" shall be presented no later than one year after the accrual of the cause of action. Section 905 sets forth those causes of action that are exceptions to the rule that a claim must be filed.

10. CAL. GOV'T CODE §910.

11. CAL. GOV'T CODE §§910.2, 910.4.

12. CAL. GOV'T CODE §910(f).

13. Hall v. City of Los Angeles, 19 Cal. 2d 198, 120 P.2d 13 (1942); Allen v. Los Angeles City Bd. of Educ., 173 Cal. App. 2d 126, 343 P.2d 170 (1959); Ghiozzi v. City of S. San Francisco, 72 Cal. App. 2d 472, 164 P.2d 902 (1946).

14. Allen v. Los Angeles City Bd. of Educ., 173 Cal. App. 2d 126, 343 P.2d 170 (1959).

agency may either accept or reject the claim, or allow the claim to be denied by operation of law after the expiration of a 45-day period.[15]

An injured party who fails to file a claim within 100 days must seek permission from the agency to file a late claim.[16] Such an application must be filed within one year of the accrual of the cause of action;[17] failure to take at least this step within one year of injury leaves the injured party entirely without remedy.[18] If leave to file a late claim is denied, the prospective claimant has six months from the date of denial to petition the court of appropriate jurisdiction for relief from the filing requirement. The petition must allege that the denial of the claimant's application was improper because one of the following conditions existed: (1) The failure to present a timely claim was through "mistake, inadvertence, surprise or excusable neglect";[19] (2) the injured party was a minor for the duration of the 100-day claim filing period;[20] (3) the injured party was physically or mentally incapacitated for the duration of the 100-day period and by reason of such disability failed to present a timely claim;[21] or (4) the injured party died prior to the expiration of the 100-day period.[22] If the court grants relief from the claim-filing requirement, suit must be commenced within 30 days.[23] If the court refuses to grant relief[24] and its decision is upheld on appeal,[25] the injured victim is barred from further action since com-

15. CAL. GOV'T CODE §911.6.
16. CAL. GOV'T CODE §911.4.
17. CAL. GOV'T CODE §911.4(b).
18. *See* Ridley v. City & County of San Francisco, 272 Cal. App. 2d 290, 77 Cal. Rptr. 199 (1969).
19. CAL. GOV'T CODE §946.6(c)(1).
20. CAL. GOV'T CODE §946.6(c)(2).
21. CAL. GOV'T CODE §946.6(c)(3).
22. CAL. GOV'T CODE §946.6(c)(4).
23. CAL. GOV'T CODE §946.6(f).
24. Case law under Government Code Sections 911.6 (grant or denial of late claim application by board) and 946.6 (relief from claim-filing requirement) shows a marked judicial reluctance to grant relief from the 100-day claim filing requirement. *See, e.g.*, Bennett v. City of Los Angeles, 12 Cal. App. 3d 116, 90 Cal. Rptr. 479 (1970); Kendrick v. City of La Mirada, 272 Cal. App. 2d 325, 77 Cal. Rptr. 444 (1969); Martin v. City of Madera, 265 Cal. App. 2d 84, 70 Cal. Rptr. 908 (1968); Hunter v. County of Los Angeles, 262 Cal. App. 2d 820, 69 Cal. Rptr. 288 (1968); Hom v. Chico Unified School Dist., 254 Cal. App. 2d 335, 61 Cal. Rptr. 920 (1967); McGranahan v. Rio Vista Joint Union High School, 224 Cal. App. 2d 624, 36 Cal. Rptr. 798 (1964); Pope v. County of Riverside, 219 Cal. App. 2d 649, 33 Cal. Rptr. 491 (1963); Gonzales v. County of Merced, 214 Cal. App. 2d 761, 29 Cal. Rptr. 675 (1963); Wall v. Sonora Union High School Dist., 240 Cal. App. 2d 870, 50 Cal. Rptr. 178 (1960). Cases decided under earlier claim statute provisions and evidencing the same sort of judicial reluctance include Baker v. Cohen, 139 Cal. App. 2d 842, 294 P.2d 518 (1956); Gale v. County of Santa Barbara, 118 Cal. App. 2d 451, 257 P.2d 1000 (1953); and Johnson v. City of Glendale, 12 Cal. App. 2d 389, 55 P.2d 580 (1936).
25. Appellate review is limited to a determination of whether or not the trial court abused its discretion in denying relief. Black v. County of Los Angeles, 12 Cal. App. 3d 670, 91 Cal. Rptr. 104 (1970); Martin v. City of Madera, 265 Cal. App. 2d 84, 70 Cal. Rptr. 908 (1968); Pope v. County of Riverside, 219 Cal. App. 2d 649, 33 Cal. Rptr. 491 (1963).

pliance with or judicial excuse from the claim requirement[26] is a condition precedent to a court's acquisition of jurisdiction over the matter.[27] One unfortunate result of the technical bar created by the claim requirement has been that it has prevented recovery on many ostensibly meritorious claims.[28]

THE EQUAL PROTECTION CHALLENGE

The fourteenth amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[29] California's state constitution similarly provides, "All laws of a general nature shall have a uniform operation,"[30] and "[n]o . . . citizen, or class of citizens, [shall] be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."[31] In essence, these guarantees of equal protection insure that the laws will have equal application to all persons similarly situated.[32] When a statute creates different classifications for persons who are similarly situated without affording equal treatment to those classes, the presence of an equal protection violation may be argued.[33] Public entity claim statutes effect a classification of tort victims into two groups: victims of "private" torts and victims of "public"

26. Judicial excuse from the requirement that the plaintiff file a claim before he may be allowed to bring suit may be given only after he has made a fruitless attempt to be permitted to file a late claim. Ridley v. City & County of San Francisco, 272 Cal. App. 2d 290, 292-93, 77 Cal. Rptr. 199, 200-01 (1969).

27. CAL. GOV'T CODE §905.2. *See, e.g.*, County of San Luis Obispo v. Ranchita Cattle Co., 16 Cal. App. 3d 383, 94 Cal. Rptr. 73 (1971); Dorow v. Santa Clara County Flood Control Dist., 4 Cal. App. 3d 389, 84 Cal. Rptr. 418 (1970); Ridley v. City & County of San Francisco, 272 Cal. App. 2d 290, 77 Cal. Rptr. 199 (1969); Fidelity & Deposit Co. v. Claude Fisher Co., 161 Cal. App. 2d 431, 327 P.2d 78 (1958); Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969).

28. "It is apparent that at least one result of the claims statutes is to provide public entities with a technical but nevertheless complete defense to many actions brought against them. This, of course, was not the intended purpose of claims procedure." Van Alstyne, *Recommendation and Study Relating to the Presentation of Claims Against Public Entities*, 2 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES A-1, A-73 (1959) [hereinafter cited as Van Alstyne]. *See, e.g.*, Roberts v. State, 39 Cal. App. 3d 844, 114 Cal. Rptr. 518 (1974); Clark v. City of Compton, 22 Cal. App. 3d 522, 99 Cal. Rptr. 613 (1971); Lewis v. City & County of San Francisco, 21 Cal. App. 3d 339, 98 Cal. Rptr. 407 (1971); Bennett v. City of Los Angeles, 12 Cal. App. 3d 116, 90 Cal. Rptr. 479 (1970).

29. U.S. CONST. amend. XIV, §1.

30. CAL. CONST. art. I, §11.

31. CAL. CONST. art. I, §21.

32. [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

33. *See* Reed v. Reed, 404 U.S. 71, 75 (1971).

or "governmental" torts.[34] Because members of the latter class are denied the relief which is available to members of the former class under the same circumstances, the tort claim statute is subject to an equal protection challenge.

A. Test to be Applied

The standard of judicial review in equal protection cases has traditionally depended on the type of interest affected by the law under scrutiny. If the legislation has been based upon a "suspect classification,"[35] such as race,[36] alienage,[37] or nationality,[38] or if it has affected a "fundamental freedom," such as the right to vote,[39] the right to worship freely,[40] or the right to travel from one state to another,[41] the statute has been subjected to strict judicial scrutiny. This strict standard requires a demonstration that a statutory classification is "necessary" to promote a "compelling state interest."[42] Implicit in this demand is a requirement that the class be narrowly tailored to promote that state interest.[43]

In contrast, classifications which are not "suspect" and that affect interests which are not regarded as "fundamental" have traditionally been judged by a much more lenient standard. This lenient standard has been termed the "rational basis" test and has been described by the United States Supreme Court in the following manner: "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the equal protection clause only if based on reasons *totally unrelated* to the pursuit of that goal."[44]

Under traditional reasoning the public entity claim statutes would most probably be judged by the rational basis test.[45] The statutes rep-

34. The effect of the claim requirement may also be stated in the converse: it classifies tortfeasors as "public" or "governmental" tortfeasors and "private" tortfeasors. *See* Reich v. State Hwy. Dep't, 386 Mich. 617, 623, 194 N.W.2d 700, 702 (1972).

35. *See generally* Shapiro v. Thompson, 394 U.S. 618, 658-59 (1969) (Harlan, J., dissenting).

36. McLaughlin v. Florida, 379 U.S. 184 (1964).

37. Graham v. Richardson, 403 U.S. 365 (1971).

38. Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944).

39. Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Board of Elections, 383 U.S. 663 (1966).

40. Sherbert v. Verner, 374 U.S. 398 (1963).

41. Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941).

42. Shapiro v. Thompson, 394 U.S. 618, 634, 644 (1969); NAACP v. Alabama, 357 U.S. 449, 463 (1958); Aiello v. Hansen, 359 F. Supp. 792, 795 (N.D. Cal. 1973).

43. Shapiro v. Thompson, 394 U.S. 618, 637 (1969).

44. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) (emphasis added).

45. But see Downing & Tehin, *The Constitutional Infirmity of the California Government Claim Statute*, 1 PEPPERDINE L. REV. 209, 216-17 (1974) [hereinafter cited as

resent essentially economic legislation which draws a distinction between victims of "private" torts and victims of "public" or "governmental" torts, thereby affecting their respective abilities to seek financial compensation for injuries wrongfully inflicted. The former class may seek compensation for their injuries at any time within the period allowed by the statute of limitations applicable to their cause of action.[46] Members of the latter class, however, must file a written, verified claim for damages within 100 days of their injury.[47] Since the rational basis test requires little more than a "rhyme or reason" for the legislative classification,[48] the claim statute would probably be upheld as constitutional under this test.[49]

More recent case law, however, indicates that the old, "hands-off" approach for essentially economic legislation may be giving way to a more demanding standard of review.[50] The fountainhead of this line of decisions is *Reed v. Reed*,[51] a United States Supreme Court case which dealt with a statute governing the appointment of administrators for the estates of intestates. The challenged statutes required that preference be given to a male relative when both a male and a female of the same degree of kinship sought the office of administrator. The *Reed* petitioner objected to the classification, which effectively prohibited her from serving as administratrix of her son's estate, on the grounds that it denied her equal protection of the law. It might be inferred that this classification was based on the rationale that men were generally supposed to have more business expertise than women and were therefore better qualified for the position of administrator. However, the sole argument advanced by the state in support of the classification was that without this means of expeditiously selecting an administrator, the dockets of the probate courts would become unbearably overloaded with hearings on such matters.[52] Although the statutory scheme did not affect a fundamental freedom or uniquely disad-

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Downing], for an argument that access to the courts could perhaps be regarded as a "fundamental interest," which would compel strict judicial scrutiny of statutes affecting that interest. *See* Boddie v. Connecticut, 401 U.S. 371 (1971); CONSTITUTION OF THE UNITED STATES OF AMERICA 1527 (L.S. Jayson ed., 7th ed. 1973).

46. *See, e.g.*, CAL. CODE CIV. PROC. §337.1 (four-year statute of limitations for suing for damages from persons performing or furnishing design or construction).

47. There are also provisions for seeking permission from the defendant entity to file a late claim, and for seeking judicial excuse from the claim-filing requirement. See text accompanying notes 16-27 *supra*, 186-188 *infra*.

48. Goeseart v. Cleary, 335 U.S. 464, 466 (1948).

49. The likelihood of such an outcome is attested to by cases which have summarily dismissed equal protection challenges to the claim requirement. See note 5 *supra*.

50. *See* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].

51. 404 U.S. 71 (1971).

52. *Id.* at 76.

vantage a suspect class,[53] the ostensibly logical reason Idaho advanced for its statute was found to be insufficient, and a unanimous Court struck down the statute, proclaiming it an unconstitutional denial of equal protection:

> [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having *a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.*"[54]

Cases decided on the federal level since *Reed* indicate that the equal protection test enunciated therein is still viable as applied to essentially economic legislation.[55] More importantly, for purposes of this discussion, in *Brown v. Merlo*[56] the California Supreme Court utilized the

53. The stricter standard of review employed in *Reed* might also be explained on grounds that the classification involved was drawn on the basis of sexual characteristics; two years after *Reed* five of the nine Justices were willing to call sex a suspect classification, Frontiero v. Richardson, 411 U.S. 677, 682 (1973). *But see* Geduldig v. Aiello, 94 S. Ct. 2485 (1974). The presence in *Reed* of what might be termed the "personal rights" involved in determining who should administer a loved one's estate might also be noted as a factor to be considered in determining what standard of review should apply.

54. 404 U.S. at 75-76 (citations omitted and emphasis added).

55. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972), phrased the equal protection question in terms of whether there was an appropriate governmental interest suitably furthered by the differential treatment imposed by a city ordinance upon nonlabor picketers as opposed to labor picketers. The stricter standard of review might be attributed to the fact that the case touched on first amendment rights. However, the Court alluded to *Reed* in its decision and analyzed the case in terms of equal protection principles: "Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 94-95. Green v. Waterford Bd. of Educ., 473 F.2d 629, 633 (2d Cir. 1973), alluded to the fact that

> the Court seems far less willing to speculate as to what unexpressed legitimate state purposes may be rationally furthered by a challenged statutory classification.
>
> The Court's definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest seems to have become slightly, but perceptibly, more rigorous.

The *Green* court utilized the *Reed* "substantial relationship" standard of review for a schoolboard regulation imposing mandatory maternity leave without pay on pregnant schoolteachers, noting that the compelling state interest test could not be applied because sex was not a suspect classification. *Id.* In *O'Neill v. Dent* the federal district court described the "new" equal protection test in these terms:

> Under this approach courts are constrained to examine the actual empirical relationship between the classification and its lawful object "rather than accept one hypothetical legislative justification to the exclusion of others" . . . and also to determine whether there is a less restrictive way to achieve these goals.

364 F. Supp. 565, 578 (E.D.N.Y. 1973) (citation omitted). *See also* Gunther, *supra* note 50, at 20.

56. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

Reed rationale in striking down California's automobile guest statute, which, like the claim provision, created an unnatural bar to an injured person's ability to sue for compensation. Rather than prohibiting suit on a stale claim or making the right to damages contingent upon the culpability of the host driver, the guest statute provided that an automobile passenger could not recover damages for negligently inflicted injuries unless he had given some consideration for the ride. The statute had traditionally been justified on two grounds: the prevention of fraud (collusive suits)[57] and the protection of hospitality.[58] Weighing these justifications against the fact that an injured party was prohibited from seeking compensation, the court concluded,

> [The classification created by the statute] is far too gross and overinclusive to be justified by this end since the statute bars the great majority of valid suits along with the fraudulent claims. . . .
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> . . . .
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> . . . The courts may and should take cognizance of fraud and collusion when found to exist in a particular case. However, the fact that there may be a greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases.[59]

In addressing the classifications created by this essentially "economic" legislation, the court spoke in terms of the necessity for narrowly-drawn classifications.[60] This is an important departure from the "rational basis" test as it was formerly known.

Since California's public entity claim statutes prevent recovery in a manner similar to the guest statute, the two types of statutes are sufficiently analogous to permit application of the *Brown* court's rationale to an analysis of the classifications created by the public entity claim statutes. Those provisions make the scope of an injured person's remedies depend upon whether he was injured by a "private" or a "public" tortfeasor. If a "public" tortfeasor inflicts the injury, a tort victim cannot recover any damages unless he complies with or is excused from the requirement that he file a written claim within 100 days. Since the *Reed* "substantial relationship" equal protection analysis was held to be the appropriate standard of review for the classifying effect of

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57. *Id.* at 873, 506 P.2d at 224-25, 106 Cal. Rptr. at 400-01.
58. *Id.* at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.
59. *Id.* at 859, 874, 506 P.2d at 215, 225, 106 Cal. Rptr. at 391, 401 (citations omitted).
60. *Id.* at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403.

the automobile guest statute, it should also be applied in scrutinizing the analogous governmental tort claim statute.

If the *Reed* analysis is to be the appropriate standard of review for the public entity claim requirements, it is necessary to examine the justifications offered in support of these provisions and to determine whether the class created by the statutes is sufficiently narrow to promote the state interest allegedly supporting the claim requirements without denying equal protection of the law to those within the class.

B. Justifications Advanced

1. Prompt Investigation

Perhaps the most frequently stated justification for the 100-day written claim requirement is that it provides the government with an opportunity to make early investigation of the claim while the facts are still fresh.[61] Early investigation is supposed to foster the prompt settlement of those claims that the investigation discloses to be meritorious.[62] The public treasury, in turn, is theoretically spared the expense of needlessly litigating a claim which is fraudulent[63] or for which settlement is the wiser alternative.[64]

However, a problem frequently engendered by compliance with the claim requirement raises serious questions about the early-investigation rationale. Often, an attorney must file a grossly inflated estimate of damages in order to effectively protect the interests of his client. If he did not, unforeseen damages might ultimately accrue which would not be encompassed by the tendered claim. A huge claim of this nature will probably be rejected by the entity against which it is filed.[65] As rejected claims would seem to deter settlement negotiations and en-

61. Viles v. State, 66 Cal. 2d 24, 423 P.2d 818, 56 Cal. Rptr. 666 (1967); Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 370 P.2d 334, 20 Cal. Rptr. 630 (1962); Eastlick v. City of Los Angeles, 29 Cal. 2d 661, 177 P.2d 558 (1947); Arbios v. County of San Bernardino, 110 Cal. 553, 42 P. 1080 (1895); Bozaich v. State, 32 Cal. App. 3d 688, 108 Cal. Rptr. 392 (1973); C.A. Magistretti Co. v. Merced Irrigation Dist., 27 Cal. App. 3d 270, 103 Cal. Rptr. 555 (1972); Sheeley v. City of Santa Clara, 215 Cal. App. 2d 83, 30 Cal. Rptr. 121 (1963); Hochfelder v. County of Los Angeles, 126 Cal. App. 2d 370, 272 P.2d 844 (1954).

62. For a suggestion that in practice it is frequently the case that even meritorious claims are routinely denied rather than considered for settlement at all, see Downing, *supra* note 45, at 224-26.

63. Artukovich v. Astendorf, 21 Cal. 2d 329, 339, 131 P.2d 831, 837 (1942) (Edmonds, J., dissenting); Arbios v. County of San Bernardino, 110 Cal. 553, 555, 42 P. 1080, 1081 (1895). *See also* Van Alystyne, *Claims Against Public Employees: More Chaos in California Law*, 8 U.C.L.A.L. REV. 497, 532 (1961).

64. Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 503, 370 P.2d 334, 335, 20 Cal. Rptr. 630, 631 (1962); Eastlick v. City of Los Angeles, 29 Cal. 2d 661, 667, 177 P.2d 558, 562 (1947); Crescent Wharf & Warehouse Co. v. City of Los Angeles, 207 Cal. 430, 437, 278 P. 1028, 1030 (1929); Hochfelder v. County of Los Angeles, 126 Cal. App. 2d 370, 374, 272 P.2d 844, 847 (1954).

65. *See* Downing, *supra* note 45, at 224-26.

courage litigation, it appears that the 100-day limitation may actually defeat the professed purpose of early investigation by increasing the quantum of public funds expended in resolving an individual's claim.

Another of the purported aims of early investigation is the detection of fraudulent claims against the public treasury.[66] Prevention of fraudulent or collusive lawsuits has long been cited as one justification for laws that classify.[67] In *Brown v. Merlo*[68] the state offered precisely that rationale in support of the classifications drawn by the automobile guest statute. Rejecting the argument, the court noted that it had found similar "anticollusion" justifications "insufficient to support significantly narrower classification schemes."[69] As previously discussed, an analogy can be drawn between the government claim provisions and the automobile guest statute in that under both statutes meritorious claims otherwise competent of judicial resolution[70] are barred along with the fraudulent ones. To the extent that this occurs, the classification appears "too gross and overinclusive" to satisfy equal protection requirements.

Even if it were assumed that a tenuous relationship exists between the conservation of the state's funds, the prevention of fraudulent lawsuits, and the 100-day limitation, there are strong countervailing public policy considerations which should be considered in judging the efficacy of the tort claim requirement. Public policy clearly favors the hearing of legitimate grievances[71] in order that injured persons may be made whole. Therefore, to the extent that a person's injuries go unrecompensed solely because the claim requirement works to suppress their otherwise timely airing, public policy should call for a modification of the claim requirement as it now stands.

Two cases particularly suggestive of this need are *McGranahan v. Rio Vista Joint Union High School*[72] and *Wall v. Sonora Union High*

66. See authorities cited note 63 *supra.*

67. For example, the rule of intrafamilial tort immunity, which classified tort victims on the basis of whether or not they were related to the tortfeasor, was justified as a measure designed to prevent collusive suits. The California Supreme Court rejected that justification and struck down the doctrine in Emery v. Emery, 45 Cal. 2d 421, 431, 289 P.2d 218, 225 (1955). A similar justification was advanced for interspousal tort immunity and parental immunity from tort liability to their own children. In Klein v. Klein, 58 Cal. 2d 692, 695-96, 376 P.2d 70, 72-73, 26 Cal. Rptr. 102, 104-05 (1962), the court rejected this justification for the classification wrought by the interspousal immunity doctrine, and abolished the rule in California. In Gibson v. Gibson, 3 Cal. 3d 914, 919-20, 923, 479 P.2d 648, 651-52, 654, 92 Cal. Rptr. 288, 291-92, 294 (1971), the doctrine of parental immunity met a similar fate.

68. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 308 (1973).

69. *Id.* at 861, 506 P.2d at 215, 106 Cal. Rptr. at 391.

70. In other words, not barred by the statute of limitations that would be applicable if the tortfeasor were a private party.

71. *See* Nilsson v. City of Los Angeles, 249 Cal. App. 2d 976, 979, 58 Cal. Rptr. 20, 23 (1967).

72. 224 Cal. App. 2d 624, 36 Cal. Rptr. 798 (1964).

School District.[73] *McGranahan* concerned a child who received an eye injury which allegedly resulted from negligent supervision by school personnel. Since the injury appeared minor, his parents did not take any action against the school within the 90-day claim filing period then in effect. Six months later, however, cataracts developed from the injury that had appeared so innocuous, and the child ultimately had to have his eye removed. Since the plaintiff had failed to file a claim within 90 days of the accident, the defendant's motion for summary judgment was granted and affirmed on appeal.[74] The *Wall* case also involved negligent supervision, the child sustaining brain damage that was not capable of being fully diagnosed until 13 months after the accident. Again, summary judgment for defendants was affirmed due to plaintiff's failure to file a written claim for damages within 90 days of the incident.[75]

Public policy favors the hearing and resolution of just claims.[76] It sanctions the notion that where a wrong has occurred, an adequate remedy should be available.[77] Our tort law is premised on the idea that one who injures another should be held responsible for making him whole again. The public entity claim provisions create a "technical but nevertheless complete defense"[78] which persists in direct contravention to these fundamental public policy considerations. In attempting to strike a balance between the alleged needs of government and the needs of persons who have been injured or damaged by government agents, these public policy considerations deserve a heavy weight on the injured parties' side of the scales.

From the foregoing it would appear that the interests purportedly served by prompt investigation do not bear the necessary relation[79] to the classification created by the 100-day claim requirement. Additionally, the goal to be attained by prompt investigation, in and of itself, can apparently be accomplished today without the aid of a 100-day limitation. As the Michigan Supreme Court observed in *Grubaugh v. City of St. Johns,*[80] a decision which found due process infirmities in a 60-day claim filing requirement,

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73. 240 Cal. App. 2d 870, 50 Cal. Rptr. 178 (1966).
74. 224 Cal. App. 2d at 627, 631, 36 Cal. Rptr. at 799, 802.
75. 240 Cal. App. 2d at 874, 50 Cal. Rptr. at 180.
76. *See* Nilsson v. City of Los Angeles, 249 Cal. App. 2d 976, 979, 58 Cal. Rptr. 20, 23 (1967).
77. "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." Marbury v. Madison, 5 U.S. (1 Cranch) 87, 93 (1803).
78. Van Alstyne, *supra* note 28, at A-73.
79. See text accompanying notes 50-60 *supra.*
80. 384 Mich. 165, 180 N.W.2d 778 (1970).

> Even if we assume the above original policy considerations were once valid, today they have lost their validity and ceased to exist due to changed circumstances. In recent years most governmental units and agencies have purchased liability insurance as authorized by statute. In addition to insurance investigators, they have police departments and full-time attorneys at their disposal to promptly investigate the causes and effects of accidents . . . . As a result these units and agencies are better prepared to investigate and defend negligence suits than are most private tortfeasors to whom no special notice provisions have been granted by the legislature.[81]

Therefore it would seem that the only result the 100-day limitation actually accomplishes is the exclusion from the courtroom of otherwise justiciable claims.

2. *Correct Offending Condition*

A second rationale advanced for the 100-day written claim requirement is that the claim gives the defendant agency prompt notice of the offending condition so that the agency can make necessary alterations or repairs and thus prevent further injuries.[82] This is a laudable objective when the claim stems from an allegedly dangerous or defective condition of property, and to the end of correcting such conditions the claim statute serves a needed, or at least beneficial, purpose. But the rationale is more difficult to sustain in the case of a personal injury arising from a government employee's negligent or intentional tort, when the victim's injury is caused by a single act rather than by a condition which can be corrected.[83]

If equal protection principles now require more narrowly drawn classes in the field of economic legislation, some alteration of California claim procedure would appear to be in order. One possibility would be to redraft the statute to require a claim only when the claimant's injury stems from a dangerous or defective condition of public property and to eliminate the requirement for injuries stemming from negligent or intentional torts of public employees. However, the practical feasibility of this solution is questionable. In many situations a claimant might determine that he was injured because of a given party's negligent conduct, while the public entity could argue that a dangerous or defective condition was responsible for the injury and that therefore a notice of claim should have been given. This would necessitate a

81. *Id.* at 177, 180 N.W.2d at 784.
82. *See* Bozaich v. State, 32 Cal. App. 3d 688, 697, 108 Cal. Rptr. 392, 398 (1973). *See also* Van Alstyne, *supra* note 28, at A-73.
83. *See* Van Alstyne, *supra* note 28, at A-74.

hearing on the issue of whether the plaintiff's injury was caused by a correctable condition or by tortious conduct. Since a finding that a correctable condition caused the injury would be a determination of failure to comply with the claim requirement, the end result of such a scheme would appear to be no different from the situation that prevails under the current claim procedure: the only way a prospective plaintiff could assure himself of the opportunity to litigate his claim would be by filing a notice of claim within the period prescribed by statute, despite the fact that he had made a good faith determination that his injury was not within the class for which the statute prescribed a notice of claim.

Perhaps a more workable solution could be achieved by approaching the problem from the standpoint of the relief provisions. If the courts were required to grant relief from the claim filing requirement unless the public entity could demonstrate that the plaintiff's injury was occasioned by a defective or dangerous condition of public property, then the class of persons burdened with the claim requirement would be narrowed to include only those whose compliance with the claim requirement would serve the legitimate state interest of correcting offending conditions before further injuries were sustained because of them.

3. *Fiscal Planning*

California case law divulges that a third justification is frequently advanced for the classification created by the claim statutes.[84] This justification centers on the rationale that the claim requirement is necessary for government fiscal planners, who require notice of potential tort claims in order to intelligently plan for future expenditures. The explanation first appeared in the late nineteenth century,[85] when public policy as well as the law apparently frowned upon the idea of governmental bodies buying insurance to cover tort liability.[86]

Today some governmental entities purchase liability insurance.[87] Others, such as the State of California, are self-insurers.[88] As to the

84. Crescent Wharf & Warehouse Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028 (1929); Arbios v. San Bernardino County, 110 Cal. 553, 42 P. 1080 (1895); Hochfelder v. County of Los Angeles, 126 Cal. App. 2d 370, 272 P.2d 844 (1954).

85. Arbios v. San Bernardino County, 110 Cal. 553, 42 P. 1080 (1895).

86. See W. PROSSER, THE LAW OF TORTS 984-85 (4th ed. 1971) for a discussion of early twentieth century case law on the question of whether expenditure of public funds for liability insurance for government agencies constituted an *ultra vires* act because the agencies enjoyed the protective shield of sovereign immunity.

87. Government Code Section 990 explicitly provides statutory authority for public entities in California to purchase liability insurance coverage coextensive with the scope of their substantive liability.

88. Interview with Jack L. Burrows, Claims Coordinator for the California Dep't of Justice, Sacramento, Cal., Aug. 20, 1974 [hereinafter cited as *Burrows*].

entities that purchase insurance, an argument can be made that the fiscal-planning rationale no longer applies; insurance premiums are calculated on the basis of past settlements or judgments paid, not on the basis of potential claims.[89] As to the self-insurer, the justification is also questionable since, at least at the state level, the annual budgetary appropriation for tort claims has habitually been approximately half of the amount which is actually paid to claimants.[90] Since tort damages are necessarily speculative until set by the judiciary or by negotiated settlement between the parties, it does not seem that knowledge of possible claims would have any significant impact on fiscal planning by the government. The *Reed* standard of equal protection review would appear to require a more substantial relationship between the classification and its purported reason than is furnished by the planning rationale.

4. Sovereign Immunity Principle

Still another explanation occasionally advanced for the government claim statute is that it constitutes the set of conditions upon which the sovereign, in creating exceptions to the doctrine of sovereign immunity from tort liability,[91] has consented to be sued.[92] The argument runs as follows: The eleventh amendment to the United States Constitution provides that a state (and by necessary implication, its political subdivisions) may be sued only with its own consent. Therefore, when the state consents to be sued, it is within its prerogative, as sovereign, to impose whatever conditions it desires upon the privilege granted.

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89. *See* Downing, *supra* note 45, at 229.

90. *Burrows, supra* note 88. The annual budget appropriations for the last four fiscal years have been relatively static: $1,410,000 for 1974-75 [CAL. STATS. 1974, c. 375, §2, Item 48]; $1,100,000 for 1973-74 [CAL. STATS. 1973, c. 129, §2, Item 48]; $1,000,000 for 1972-73 [CAL. STATS. 1972, c. 156, §2, Item 46, at 230-31]; and $1,000,000 for 1971-72 [CAL. STATS. 1971, c. 266, §2, Item 45, at 437]. The language in each of these appropriations provides that the appropriations are for the

> administration, investigation, adjustment, defense and payment of tort liability claims, settlements, compromises, and judgments against the state, its officers, servants and employees, . . . or for the purchase of insurance protecting the state, its officers, servants and employees against such tort liability claims . . . .

Mr. Burrows indicated that he is generally able to make the annual appropriation last about five to seven months into the fiscal year; thereafter funds must be procured by special appropriations.

91. Strictly speaking, "sovereign immunity" refers to immunity of the state government from suit, while "governmental immunity" is the proper term for the same type of immunity at local government level. *See* 8 U. RICHMOND L. REV. 372 (1974). For purposes of convenience, the terms are used interchangeably in this comment.

92. Artukovich v. Astendorf, 21 Cal. 2d 329, 131 P.2d 831 (1942); Roberts v. State, 39 Cal. App. 3d 844, 114 Cal. Rptr. 518 (1974); Bozaich v. State, 32 Cal. App. 3d 688, 108 Cal. Rptr. 392 (1973); Wadley v. County of Los Angeles, 205 Cal. App. 2d 668, 23 Cal. Rptr. 154 (1962); Johnson v. City of Glendale, 12 Cal. App. 2d 389, 55 P.2d 580 (1936).

This contention may be accurate to the extent that it does not exceed constitutional limitations on the state legislature's power to impose conditions on state-granted privileges,[93] but its foundation is weak. The sovereign immunity concept of the eleventh amendment is like a creature from the legal deep; no one seems to know quite from whence it came.[94] Several jurisdictions, including California, have attested to the doctrine's weak foundation by continually questioning its validity over the last two decades.[95] Fourteen years ago, in *Muskopf v. Corning Hospital District*,[96] the California Supreme Court stated,

> After a reevaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust.
>
> . . . .
>
> The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia.
>
> . . . .
>
> In formulating "rules" and "exceptions" we are apt to forget that when there is negligence, *the rule is liability, immunity is the exception.*[97]

This language impels close scrutiny of the traces of common law sovereign immunity principles which persist in the law today.[98] It is submitted that public entity tort claim statutes are little more than vestiges of that ancient, anachronistic doctrine;[99] as such, they are ripe for repeal.

C. Recent Case Law

To date, two state supreme courts have found their government claim requirements to be unconstitutional denials of equal protection.

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93. CAL. CONST. art. III, §5: "Suits may be brought against the state in such manner and in such courts as shall be directed by law." *Cf.*, Bozaich v. State, 32 Cal. App. 3d 688, 697, 108 Cal. Rptr. 392, 397 (1973). See text accompanying note 141 *infra*.

94. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 214-16, 359 P.2d 457, 458-60, 11 Cal. Rptr. 89, 90-92 (1961); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 512-18 (1898); W. PROSSER, THE LAW OF TORTS 970-87 (4th ed. 1971).

95. W. PROSSER, THE LAW OF TORTS 977 (4th ed. 1971). *See also* Note, *Governmental Immunity from Tort Liability: Has The Rationale Disappeared?*, 39 U.M.K.C.L. REV. 252 (1971).

96. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

97. *Id.* at 213, 216, 219, 359 P.2d at 458, 460, 462, 11 Cal. Rptr. at 90, 92, 94 (emphasis added).

98. See Note, *Governmental Immunity From Tort Liability: Has The Rationale Disappeared?*, 39 U.M.K.C.L. REV. 252, 254-55 (1971), for a brief treatment of the ideological weaknesses underlying the doctrine of sovereign immunity in the United States.

99. "The claim-filing requirements of the Government Code are directly related to the doctrine of governmental immunity and exist for the benefit of the state . . . ." Bozaich v. State, 32 Cal. App. 3d 688, 698, 108 Cal. Rptr. 392, 398 (1973).

In the 1972 case of *Reich v. State Highway Department*,[100] the Michigan Supreme Court struck down a 60-day claim requirement. Noting that the claim provision had been enacted as part of a statutory scheme for general public liability, the court observed that the effect of the claim requirement was to arbitrarily create artificial subclasses within the natural classes of tortfeasors and tort victims.[101] Since the professed purpose of Michigan's public liability act had been to make the government's tort liability coextensive with private parties' and thereby create a general rule of government liability subject to statutory exception, the distinction that the tort claim provision drew between the public and private sectors was irrational in the sense of being out of harmony with the statutory framework which supported it. As to tortfeasors, the court observed,

> This diverse treatment of members of a class along the lines of government or private tortfeasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection.[102]

In a like manner the court acknowledged that the statute arbitrarily distinguished between "private" and "public" tort victims, and held that "[t]he notice requirement acts as a special statute of limitations which arbitrarily bars the actions of the victims of governmental negligence. . . . Such arbitrary treatment clearly violates the equal protection guarantees of our State and Federal Constitutions."[103] A year later Nevada followed Michigan court's analysis and invalidated its six-month public entity claim-filing requirement[104] on equal protection grounds.[105]

Roberts v. State[106] is the most recent case to address the constitutionality of California's government claim requirement. The petitioner urged a state appellate court to adopt the rationale of the Michigan and Nevada cases and to declare California's statute constitutionally invalid as a denial of equal protection. The court refused to follow either case, stating that since California's statutory provisions for public liability and actions against the government[107] (hereinafter referred to collectively as

100. 386 Mich. 617, 194 N.W.2d 700 (1972).
101. *Id.* at 623, 194 N.W.2d at 702.
102. *Id.*
103. *Id.* at 623-24, 194 N.W.2d at 702.
104. Nevada Revised Statutes Section 244.250 required that a claim be filed within six months of accrual of a cause of action. Section 244.245 made filing of such a claim a condition precedent to ability to bring suit on the matter.
105. Turner v. Staggs, 89 Nev., Adv. Op. 78, 510 P.2d 879 (1973).
106. 39 Cal. App. 3d 844, 114 Cal. Rptr. 518 (1974).
107. CAL. GOV'T CODE div. 3.6 (commencing with §810).

the Public Liability Act) were not enacted with the intent of creating general liability for government,[108] but rather were enacted to create express statutory liability in given situations while otherwise preserving general immunity principles,[109] the reasoning of the other jurisdictions was inapplicable.[110]

This rationale, it is submitted, falls far short of responsible, in-depth equal protection analysis. Whether the California Public Liability Act creates general liability for government or repudiates the *Muskopf v. Corning Hospital District*[111] decision and reaffirms the principle of governmental tort immunity appears to be irrelevant. The claims statutes still effect a classification between government and private tort victims and impose on the former class the burden of complying with a special statute of limitations. Therefore, under the *Reed* line of cases the judiciary must examine the classification and determine whether the reasons advanced for its existence bear "a fair and substantial relation to the object of the legislation."[112] However, rather than examining the justifications for the 100-day claim requirement, the *Roberts* court looked to the general nature of the California Public Liability Act. The court found that the statutory scheme was enacted for the purpose of preserving limited governmental liability and held that the claim provision was consistent with this purpose.[113] The court clearly failed to examine the justification for the *claim requirement provision itself*, without reference to the purposes that purportedly underlay the Public Liability Act, and ascertain whether the classification created by the claim provision was narrowly drawn to promote the purposes which assertedly justified *that particular provision.*

Equal protection analysis is concerned with the classification effected by the specific statute under consideration. Having found a classification created by the law, the next inquiry is whether the classification operates to disadvantage the members of one of the classes created.[114] As previously discussed, the claim requirement does disadvantage members of the class of "victims of public torts." The next question, therefore, must be directed to the state's justification for the burdensome treatment imposed by the statutory classification. As the *Reed* Court phrased it, the task of the judiciary is to determine whether the

108. 39 Cal. App. 3d at 849, 114 Cal. Rptr. at 521. *But see* Comment, *Governmental Liability for Torts of Employees—The End of Sovereign Immunity in California,* 5 SANTA CLARA LAW. 81 (1964).
109. 39 Cal. App. 3d at 849, 114 Cal. Rptr. at 521.
110. *Id.* at 849-50, 114 Cal. Rptr. at 521.
111. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).
112. Reed v. Reed, 404 U.S. 71, 75 (1971).
113. 39 Cal. App. 3d at 849, 114 Cal. Rptr. at 521.
114. Yick Wo v. Hopkins, 118 U.S. 356, 367-68 (1886).

classification "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation."[115]

Applying this rationale to its analysis of the guest statute in *Brown v. Merlo*, the California Supreme Court stated,

> The primary concern of the "equal protection" guarantee of our state and federal Constitutions, however, is that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment" . . . and we believe that . . . the guest statute's wholesale elimination of causes of action fails to provide such "like treatment" for "similarly situated" individuals.[116]

Brown held that the guest statute presented a "classic case" of an "impermissibly overinclusive classification scheme."[117] Similarly, the public entity claim provisions create an impermissibly overinclusve classification by barring from the courtroom all actions against public entities unless the prospective plaintiff has complied with the claim requirement, even though the claim is not needed for purposes of "prompt investigation,"[118] there is no "offending condition" to correct,[119] and the entity habitually neglects to "plan" for its pending tort liabilities.[102]

Judicial response to the equal protection challenges launched against California's public entity claim requirement has been couched in terms of deference to the legislature's prerogative as policy maker under the separation of powers doctrine.[121] In this vein, the *Roberts* court stated that

> [t]he argument in plaintiff's closing brief that "when the state undertakes to divest itself from the cloak of immunity it must stand on an equal basis with other similarly situated tortfeasors" would have merit only if the California Legislature so provided, or if some legislative action indicated that the reasons for the claims statute no longer had compelling force.[122]

But it is the separation of powers doctrine which provides the court with the basis to consider the equal protection problem. In the words of Justice Marshall, "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is."[123] The judiciary, no less

115. 404 U.S. at 75.
116. 8 Cal. 3d 855, 876, 506 P.2d 212, 227, 106 Cal. Rptr. 388, 403 (1973).
117. *Id.*
118. See text accompanying notes 61-81 *supra.*
119. See text accompanying notes 82-83 *supra.*
120. See text accompanying notes 84-90 *supra.*
121. *See, e.g.*, Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 504, 370 P.2d 334, 335, 20 Cal. Rptr. 630, 631 (1962); Roberts v. State, 39 Cal. App. 3d 844, 850, 114 Cal. Rptr. 518, 522 (1974); Lewis v. City & County of San Francisco, 21 Cal. App. 3d 339, 340-41, 98 Cal. Rptr. 407, 408 (1971).
122. 39 Cal. App. 3d 844, 849, 114 Cal. Rptr. 518, 522 (1974).
123. Marbury v. Madison, 5 U.S. (1 Cranch) 87, 111 (1803).

than the legislature, is not only competent, but duty-bound to judge whether or not "the reasons for the claims statute [still have] compelling force."

THE DUE PROCESS CHALLENGE

Both the United States and California Constitutions limit the power of government to act in an arbitrary or unfair manner by providing in their respective due process clauses[124] that no person shall be deprived of life, liberty, or property without due process of law. The dividing line between what is "due process of law" and what is not "due process of law" is difficult to ascertain. Perhaps more than in any other segment of constitutional law, the questions that arise in the due process area lend themselves to resolution on a case-by-case basis. As the United States Supreme Court has stated, " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts."[125]

A. Substantive Due Process

In the 1970 case of *Grubaugh v. City of St. Johns*,[126] the Supreme Court of Michigan dealt with the question whether a 60-day public entity tort claim requirement violated due process as to minors and persons incompetent to bring an action. Plaintiff, a minor, had been permanently blinded as a result of injuries suffered in an automobile accident on an allegedly defective public road. Within the normal, two-year period of limitation for personal injury actions, the boy's guardian brought suit against the city,[127] which moved to dismiss the complaint on the basis of plaintiff's failure to comply with the 60-day claim requirement.[128]

Noting that the substantive due process guarantees of the fifth and fourteenth amendments do not attach to all interests, but do protect property rights, the Michigan court found it necessary to ascertain whether the state's statutory waiver of sovereign immunity resulted in the imposition of liability on the state and its political subdivisions or whether the waiver merely amounted to a consent to be sued. If the law imposed liability, it would create a cause of action for a party in-

124. U.S. Const. amend. V; amend. XIV, §1. CAL. CONST. art. I, §13. The due process guarantee of the California Constitution is "identical in scope and purpose with the due process clause of the federal constitution." Gray v. Whitmore, 17 Cal. App. 3d 1, 20, 94 Cal. Rptr. 904, 914 (1971).

125. Hannah v. Larche, 363 U.S. 420, 442 (1960).

126. 384 Mich. 165, 180 N.W.2d 778 (1970).

127. *Id.* at 168, 180 N.W.2d at 780.

128. *Id.*

jured through the fault of a public entity.[129] This cause of action was characterized by the court as a vested property right upon which there could be no arbitrary impingement.[130] Conversely, if the law were in essence a consent statute permitting suit against the sovereign in its own courts, the ability to bring such an action would be a "privilege" that could be withdrawn as readily as it had been granted.[131]

The Michigan court characterized the public liability act as a statute creating liability where governmental immunity had previously barred causes of action for damages.[132] Since the law was found to impose liability rather than merely to afford a forum or create a remedy, a right to sue the city for damages vested in the plaintiff at the time he sustained his injuries.[133] The court observed, "Under the statute a plaintiff could institute suit on the first or fifty-ninth day after the injury. To take away his cause of action on the sixty-first day because he could not meet the notice provisions of the act would deprive him of a vested right of action without due process of law."[134] The state had sought to counter any finding of arbitrariness by asserting that the statute afforded public entities prompt notice and an opportunity to investigate alleged torts.[135] The court replied that such policy considerations as might once have justified this alleged need to promptly investigate had lost their validity over the years and, accordingly, "condemn[ed] the purely capricious and arbitrary exercise of legislative power whereby a wrongful and highly injurious invasion of rights [was] sanctioned and the litigant who fail[ed] to submit the required notice of claim [was] stripped of all real remedy."[136]

The persuasiveness[137] of *Grubaugh v. City of St. Johns* is minimal if it is read as being limited to its facts, since California's claim statutes provide that a plaintiff who was a minor during the 100-day period must be granted leave to file a late claim anytime within one year of the accrual of his cause of action.[138] However, the text of the *Gru-*

129. *Id.* at 171, 180 N.W.2d at 781.
130. *Id.* at 173, 180 N.W.2d at 781-82.
131. *Id.* at 171, 180 N.W.2d at 781. *But cf.* Goldberg v. Kelly, 397 U.S. 254 (1970).
132. 384 Mich. at 173, 180 N.W.2d at 782.
133. *Id.* at 174-75, 180 N.W.2d at 783.
134. *Id.* at 175, 180 N.W.2d at 783.
135. *Id.*
136. *Id.* at 176, 180 N.W.2d at 784.
137. Since *Grubaugh* is a product of another state's tribunal, it obviously cannot be characterized as "authority" for any court in California. The case is offered as an example of analysis that a California court could apply to this state's claim provisions. Although *Grubaugh* was decided on both federal and state constitutional grounds, recent federal case law indicates that economic legislation will remain largely untouched by the United States Supreme Court under substantive due process analysis. North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).
138. CAL. GOV'T CODE §946.6(c)(2). This leaves untouched, however, the problem that a minor must file a claim to preserve his cause of action against a governmen-

baugh decision suggests that the arbitrariness condemned by that court was not confined to the rights of minors issue, but encompassed the entire problem that arises when a dividing line is placed between "governmental" and "private" tortfeasors (or tort victims). After it found that the state's waiver of tort immunity had given the plaintiff a vested property right, the court analyzed the problem in terms of rights of action against government agencies, *not* in terms of the disabled minor's particular right:

> The substantive right to proceed against the governmental tortfeasor . . . must arise under the same conditions and undiminished by any special exemption as any other comparable cause of action.
>
> . . . .
>
> . . . [W]e hold that this cause of action is entitled under the due process clause to the same protection against arbitrary interference as any other right.[139]

Under the *Grubaugh* rationale it can be argued that depriving any injured party, whether disabled or not, of a right to bring an action is an arbitrary act unless there is adequate justification for this deprivation. When the justification advanced for the deprivation is premised on notions that are no longer viable, it would seem that the arbitrariness fails to dissipate and due process fails to be afforded to those persons whose property rights are affected by the distinction drawn between governmental and private tortfeasors and their victims.

The extent to which *Grubaugh*'s reasoning could be directly applied in California depends largely on the nature of California's Public Liability Act. If the act imposes liability where immunity was previously the rule, it would seem that a property right which is within the pale of the due process guarantees must vest in an injured party at the moment of injury.[140] If the act is merely a consent to be sued, however, it would not seem to give rise to a vested right; it must be remembered, however, that ability to exercise even a state-granted "privilege" may not be conditioned on a requirement that does not comport with constitutional guarantees.[141]

The history of common law sovereign immunity in California and the general tenor of the California Public Liability Act lend some substance

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tal tortfeasor, while his minority status would automatically toll the statute of limitations until he reached majority if the action were against a private tortfeasor.

139. 384 Mich. at 174, 180 N.W.2d at 783.

140. "[W]e conclude that the cause of action here pleaded by plaintiff was an accrued vested right and, as such, is *pari causa* with traditional proprietary rights and is to be equally protected from arbitrary interference." Grubaugh v. City of St. Johns, 384 Mich. 165, 174-75, 180 N.W.2d 778, 783 (1970).

141. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); O'Neil, *Mr. Justice Brennan and the Condition of Unconstitutional Conditions*, 4 RUTGERS CAMDEN L.J. 58 (1972). *But see* Artukovich v. Astendorf, 21 Cal. 2d 329, 131 P.2d 831 (1942).

to the argument that California's public liability laws impose liability rather than simply give consent for suit to be brought against the sovereign. Until 1961 the common law doctrine of sovereign immunity shielded public entities from tort liability except where a specific statute or judicial decision provided for liability.[142] However, in 1961 the California Supreme Court held, in *Muskopf v. Corning Hospital District*,[143] that the common law doctrine of sovereign immunity was "an anachronism, without rational basis,"[144] that the doctrine was sustained only by the force of inertia, and that its abolition was imperative. The state legislature responded by imposing a two-year moratorium on prospective plaintiffs' rights to sue,[145] while a study was commenced to determine the best legislative response to the *Muskopf* decision.

The product of this legislative study is the California Public Liability Act of 1963,[146] whose basic premise is articulated in section 815 of the California Government Code: "*Except as otherwise provided by statute* . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."[147] Judicial construction of the statute has reiterated the basic premise that public liability in California is conditioned on its express statutory provision.[148] It follows that the statutes which "provide otherwise" and form exceptions to the rule in section 815 must impose liability on the sovereign, rather than merely embody its consent to be sued in its own courts.

Public entity claim procedure in California is governed by provisions that were added to the code as part of the Public Liability Act, which *imposes liability* on public entities by specific statutory pronouncement. Since the claim requirement is activated only after the prospective claimant's grievance has been found to come within the bounds of a code section which imposes liability[149] and which therefore should create a right of action, it would seem that the California claim requirement should be subjected to the same sort of constitutional scrutiny as that to which Michigan's claim requirement was subjected in *Grubaugh*.

Even if the statutory exceptions to section 815 do not create a *right*

142. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961).
143. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).
144. *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.
145. CAL. STATS. 1961, c. 1404, at 3209.
146. CAL. GOV'T CODE div. 3.6 (commencing with §810), *as enacted*, CAL. STATS. 1963, c. 1681, §1, at 3267.
147. CAL. GOV'T CODE §815(a) (emphasis added).
148. Gonzales v. State, 29 Cal. App. 3d 585, 105 Cal. Rptr. 804 (1972); Susman v. City of Los Angeles, 269 Cal. App. 2d 803, 75 Cal. Rptr. 240 (1969); Datil v. City of Los Angeles, 263 Cal. App. 2d 655, 69 Cal. Rptr. 788 (1968).
149. CAL. GOV'T CODE §905.8.

to sue a public entity for damages in California, the question remains, in light of developments since *Grubaugh*, whether the 100-day claim requirement is consonant with substantive due process limitations on arbitrariness.[150] In considering that question, considerable weight should be given to the fact that the claim requirement frequently bars the hearing of potentially meritorious claims. Further, the justifications advanced for the requirement appear, as the Michigan court observed for that state, to have outlived their usefulness.[151] Perhaps now is the time to ask why a tort victim should be barred from seeking compensation for his injuries simply because a "governmental" tortfeasor inflicted them. A remedy should be available where a wrong has occurred, and tortfeasors should be held to a standard of responsibility for making their victims whole again.

B. Procedural Due Process

California's public entity claim statutes may also be vulnerable to a procedural due process challenge. In five recent cases the United States Supreme Court has employed an "irrebuttable presumption" analysis to strike down legislation creating classifications.[152] The analysis proceeds as follows: When a statute imposes a burden upon a class of individuals for a certain purpose, and some individuals in the disadvantaged class are so situated that burdening them does not further that purpose, then the statutory scheme must be modified, if administratively feasible, to provide for a determination of the applicability of the statutory presumption to each particular case. The goal of providing such a procedure is to insure more careful selection of those who must bear the statutory burden. The legislature is said to have "conclusively presumed" that the fact which justifies the imposition of the burden is common to all individuals within the class, and due process is said to require that an opportunity be provided to rebut the presumption.[153]

To determine whether the irrebuttable presumption doctrine can be applied to the claim statutes, it is necessary to review the five recent cases in which the United States Supreme Court has utilized this doctrine. The first of these, *Bell v. Burson*,[154] involved a Georgia statute

150. See text accompanying note 141 *supra.*

151. See text accompanying notes 79-81, 134-136 *supra.*

152. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).

153. Since most legislation classifies to some extent, the use of this doctrine may be tremendously expanded, as has been noted by vigorous dissenting opinions. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 462 (1973) (Burger, C.J., dissenting).

154. 402 U.S. 535 (1971). The *Bell* decision does not contain the "conclusive presumption" language found in the later cases employing this doctrine. However, in later cases the Supreme Court has characterized *Bell* as a "conclusive presumption" case. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 446 (1973).

which provided that an uninsured motorist who was involved in an automobile accident but could not post security for damages would lose his driver's license without a hearing. The Court held that the state could not in effect presume that every indigent motorist who became involved in an accident was probably at fault and therefore had to be banished from the public highways in order to "[protect other] claimant[s] from the possibility of an unrecoverable judgment."[155] Due process required that a hearing be provided to determine whether there was a reasonable possibility that a judgment could be returned against the motorist in the amount claimed against him by the other party to the accident; upon such a showing, revocation of his driver's license would not violate his constitutional right to procedural due process.[156] The next case considered by the Court was *Stanley v. Illinois*.[157] The statutory scheme which was found to be deficient in that case provided that the state would take custody of illegitimate children upon the death of their mother, and the father would be given no opportunity to show his fitness to care for the children. The Court held that the state could not conclusively presume that the father was unfit to raise his children; instead it was required by the due process guarantees to give him a hearing on the issue of his fitness as a parent.[158] *Vlandis v. Kline*,[159] the next case in this area, involved a statute which classified a student as a nonresident on the basis of his address during the year preceding his application for admission to the state university.[160] The Court struck down the statute and held that the state could not deny resident tuition rates to an individual on the basis of an irrebuttable presumption as to his current residence when the presumed fact was not necessarily true and a reasonable alternative means was available for determining the student's actual residence.[161] *United States Department of Agriculture v. Murry*[162] dealt with a federal statute that denied food stamps to any household containing a member over 18 years of age who had been claimed as a federal income tax dependent for the previous year by a party who was not eligible for food stamps. This provision was allegedly enacted to prevent college students who were children of wealthy parents from taking advantage of the food stamp program,[163] and presumed that affected tax dependents' households were

155. 402 U.S. at 540.
156. *Id.* at 542.
157. 405 U.S. 645 (1972).
158. *Id.* at 658.
159. 412 U.S. 441 (1973).
160. The determination for married students was based on their address at the time of application for admission. *Id.* at 443.
161. *Id.* at 452.
162. 413 U.S. 508 (1973).
163. *Id.* at 513.

not needy.[164] Citing *Bell, Stanley,* and *Vlandis,* the Court held that this "irrebuttable presumption often contrary to fact" was violative of due process.[165] The Court's development of the irrebuttable presumption doctrine culminated with *Cleveland Board of Education v. La Fleur.*[166] Although this case did not involve a statute, it did result from a school board rule which required a pregnant teacher to take unpaid maternity leave beginning four months before the birth of her child and continuing until the start of the semester after the child was three months old. The presumption reflected here was that "every pregnant teacher who reache[d] the fifth or sixth month of pregnancy [was] physically incapable of continuing" to teach.[167] Finding *Bell, Stanley, Vlandis* and *Murry* controlling, the Court stated, "Thus the conclusive presumption embodied in these rules, like that in *Vlandis,* is neither 'necessarily nor universally true,' and is violative of the Due Process Clause."[168]

It is submitted that the irrebuttable presumption doctrine enunciated in *Bell, Stanley, Vlandis, Murry,* and *LaFleur* can be applied to the claim statutes. The effect of these statutes is the denial of compensation to certain individuals for a particular purpose, and implicit in the assertion of that purpose are certain irrebuttable presumptions.

Depending on the rationale being advanced to support the claim statutes, different presumptions are created. If the "prompt investigation" rationale is being offered,[169] the presumption is created that all claims presented after 100 days will be incapable of an investigation adequate to allow the public entity to settle those claims which are meritorious and collect that information which is relevant. However, nongovernmental tortfeasors are apparently able to conduct investigations and settle valid suits when a complaint is filed within the period prescribed by the regular statute of limitations, and public entities are, if anything, better prepared to investigate claims against them than are private parties.[170]

If the rationale offered in defense of the claim statutes is that prompt notice is required to correct the offending condition,[171] a different presumption arises. Under this rationale it is presumed that any claim presented after 100 days will prevent the entity from correcting haz-

164. *Id.* at 511.
165. *Id.* at 514.
166. 414 U.S. 632 (1974).
167. *Id.* at 644.
168. *Id.* at 646.
169. See text accompanying notes 61-81 *supra.*
170. *See* Grubaugh v. City of St. Johns, 384 Mich. 165, 176, 180 N.W.2d 778, 784 (1970).
171. See text accompanying notes 82-83 *supra.*

ardous conditions in time to avert further harm. This may well be true in certain cases, but again the presumption is irrebuttable, and the claimant is given no opportunity to show, for example, that the governmental entity was fully informed of the problem[172] or that there was no offending condition to correct.[173]

Finally, if the rationale offered is that the 100-day claim requirement is necessary for fiscal planning, the irrebuttable presumption is that claims submitted more than 100 days after the injury cannot be used for planning purposes. However, the due process pronouncements handed down by the United States Supreme Court would seem at least to require that the claimant be given an opportunity to show that the entity does have insurance and thus does not plan a budget on the basis of current claims.[174] Alternatively, the claimant should be allowed to show that the entity never has budgeted an amount adequate to cover the claims paid out and thus does not seem to be planning at all.[175]

It can, of course, be argued that there are major distinctions between California's claim statutes and those statutes struck down by the United States Supreme Court. First, it may be asserted that the irrebuttable presumptions implicit in the California claim statutes are not apparent on the face of the provisions themselves, but rather arise upon examination of the rationale traditionally offered to support the provisions. This assertion, if accurate, would distinguish the statutes considered in *Bell, Stanley, Vlandis, Murry,* and *LaFleur* from the California claim statutes.[176] However, in each case the Court has looked beyond the face of the statute and has examined the legislative purposes asserted in justification of the statutes.[177] Additionally, as the Court in *Bell v. Burson* stated when commenting on the general area of due process, " '[I]n this area . . . *we look to substance, not to bare form, to determine whether constitutional minimums have been honored.*' "[178] In light of this language and the Court's demonstrated willingness to look

172. *See, e.g.*, Bennett v. City of Los Angeles, 12 Cal. App. 3d 116, 90 Cal. Rptr. 479 (1970).

173. *See, e.g.*, Shaddox v. Melcher, 270 Cal. App. 2d 598, 76 Cal. Rptr. 80 (1969) (accident involving a state automobile).

174. See text accompanying notes 87 and 89 *supra.*

175. See text accompanying notes 88 and 90 *supra.*

176. In *Bell*, the mandatory suspension requirement could be said to embody a presumption of fault. In *Stanley*, a presumption of parental unfitness was manifested by the statute's command that children become wards of the state. The *Vlandis* statute's requirement that the persons who fitted within its confines pay nonresident tuition rates reflected a presumption of nonresidency. In *Murry*, the statutory denial of food stamps connoted a presumption that the applicant had no need for them. The school board's rule in *LaFleur* presumed the inability to teach.

177. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. at 640-41, 644; United States Dep't of Agric. v. Murry, 413 U.S. at 512-13; Vlandis v. Kline, 412 U.S. at 448-51; Stanley v. Illinois, 405 U.S. at 652; Bell v. Burson, 402 U.S. at 540.

178. 402 U.S. at 541 (emphasis added), *quoting* Wilner v. Committee on Character, 373 U.S. 96 (1963).

beyond the face of the statute, drawing a distinction between California's claim statutes and those measures already invalidated by the Court would seem to be an analysis more of form than of substance if it is done on the basis that the presumption inheres in the rationale for the statute rather than in the statute itself.

It might also be argued that the interest affected by the claim statutes is much less weighty than those interests involved in prior cases.[179] However, an injured person's substantive right to seek recompense for a wrong is an interest that is accorded great weight in our society's order of priorities,[180] and is arguably as vital as those rights protected in *Bell*, *Vlandis*, and *Murry*.

Probably the most important distinction between the claim statutes and those previously stricken is that a party affected by the claim requirement initially has an opportunity to avoid the burden of the presumption and preserve his cause of action, as it is only through his own inactivity that the burden is imposed. Perhaps this argument can be partially answered by examining the fact that in numerous cases the injured party simply does not recognize the need for an attorney and therefore does not contact one before the 100-day period has expired.[181] This was the situation in *Roberts v. State*,[182] the last case to challenge the statute. If the period of time allowed for filing a claim is so short that it often passes before an injured party is aware of this opportunity to preserve his cause of action,[183] then it can be argued that the manner in which the presumption arises under the claim requirement cannot be completely distinguished from the way in which the presumptions arose under the statutes in *Vlandis* and *Murry* and the regulation in *LaFleur*. For purposes of constitutional analysis, an inadequate opportunity to avoid the burden imposed by the

179. The interest in freedom to travel, *Bell v. Burson* and *Vlandis v. Kline*; the interest in raising one's own children, *Stanley v. Illinois*; the interest in food for survival, *United States Dep't of Agric. v. Murry*; the interest in having children, *Cleveland Bd. of Educ. v. LaFleur*.

180. "It is, of course, fundamental in the law of torts that *any person proximately injured by the act of another*, whether that act be willful or negligent *should*, in the absence of statute *or compelling reasons of public policy*, be compensated." Klein v. Klein, 58 Cal. 2d 692, 694-95, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962) (emphasis added).

181. *See, e.g.*, Tammen v. County of San Diego, 66 Cal. 2d 468, 426 P.2d 753, 58 Cal. Rptr. 249 (1967); Viles v. State, 66 Cal. 2d 24, 423 P.2d 818, 56 Cal. Rptr. 666 (1967); Bennett v. City of Los Angeles, 12 Cal. App. 3d 116, 90 Cal. Rptr. 479 (1970); Shaddox v. Melcher, 270 Cal. App. 2d 598, 76 Cal. Rptr. 80 (1969).

182. 39 Cal. App. 3d 844, 114 Cal. Rptr. 518 (1974).

183. The frequency with which this occurs is illustrated by the wealth of cases that have been brought by prospective claimants who missed the cut-off date for filing. *See* Van Alstyne, *supra* note 28, at A-73. *See also* Tammen v. County of San Diego, 66 Cal. 2d 468, 426 P.2d 753, 58 Cal. Rptr. 249 (1967); Viles v. State, 66 Cal. 2d 24, 423 P.2d 818, 56 Cal. Rptr. 666 (1967); Roberts v. State, 39 Cal. App. 3d 844, 114 Cal. Rptr. 518 (1974); Bennett v. City of Los Angeles, 12 Cal. App. 3d 116, 90 Cal. Rptr. 479 (1970); Shaddox v. Melcher, 270 Cal. App. 2d 598, 76 Cal. Rptr. 80 (1969).

presumption may be little better than no opportunity at all. This would seem to be particularly true when, as courts have noted, the human tragedy with which the individuals may be preoccupied makes it likely that their minds are on other matters.[184] Furthermore, in determining whether the distinction is of constitutional dimensions, the question of state interest should again be considered. In light of the very questionable viability of the state interests alleged in support of California's claim statutes,[185] the fact that a person has 100 days from the date of an injury or even a death in which he can act to avoid the presumption should not, by itself, suffice to uphold the claim statutes in the face of a procedural due process challenge.

If California's claim statutes were found to be violative of procedural due process because of the creation of an irrebuttable presumption which is not necessarily true, modification of the statutes would be required to provide for a hearing to determine whether the characteristics previously presumed are in fact true in each particular case. Proponents of the statutes may contend that section 946.6 of the Government Code provides for this hearing and thus effectively counters any due process objection. This provision allows a party to petition the court for relief from the claim filing requirement on several grounds,[186] the most important of which is "that failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect."[187] Upon such a finding and a determination that the application to file a late claim was made within a reasonable time not to exceed one year, the statute requires the court to grant relief unless the agency shows that it would be prejudiced thereby.[188] Thus one might argue that a claimant will be denied relief only in those cases in which the justifications propounded for the claim requirements are actually valid. Regrettably, however, case law on section 946.6 does not support this contention. The courts not only require the claimant to show by a preponderance of the evidence that his delay was reasonable,[189] but also that it was not occasioned solely by ignorance of the claim requirement.[190] The following language is illustrative: "In such case the burden of showing 'mistake, inadvertence, surprise or excusable neglect' is on the moving party who must meet his burden by a 'preponderance of the evi-

184. Bennett v. City of Los Angeles, 12 Cal. App. 3d 116, 121, 90 Cal. Rptr. 479, 483 (1970).
185. See text accompanying notes 61-99 *supra.*
186. See text accompanying notes 19-22 *supra.*
187. CAL. GOV'T CODE §946.6(c).
188. *Id.*
189. *See* Viles v. State, 66 Cal. 2d 24, 29-30, 423 P.2d 818, 822, 56 Cal. Rptr. 666, 670 (1967); Shaddox v. Melcher, 270 Cal. App. 2d 598, 601, 76 Cal. Rptr. 80, 83 (1969).
190. *See* Tammen v. County of San Diego, 66 Cal. 2d 468, 476, 426 P.2d 753, 758, 58 Cal. Rptr. 249, 254 (1967).

dence.' "[191] A court can deny the requested relief solely because the application to file a late claim was not made within what it deems to be a reasonable time.[192] It can also deny relief because it finds that the plaintiff's failure to file within 100 days was not caused by what it would term "mistake, inadvertence, surprise, or reasonable neglect," as was brutally illustrated in *Bennett v. City of Los Angeles.*[193] In that case, the plaintiffs' child had been killed when he was buried under a cement wall that had been left in a hazardous condition by the city.[194] Although a claim was not filed until 119 days after the accident, the city had been fully informed of the details of the incident only two days after it had taken place.[195] Plaintiffs sought judicial relief after the city had denied their application for leave to present a late claim, alleging that they had not known of the claim requirement until they consulted an attorney 119 days after their son's death and that a letter of condolence written to them by the defendant had led them to believe that the city would take voluntary steps to reimburse them. Since it knew of the accident almost immediately, the city could not possibly have been prejudiced in its effort to prevent further tragedies.[196] Similarly, it could not have been prejudiced in its attempt to investigate, as it already possessed all the information necessary to conduct an investigation.[197] Further, it is difficult to believe that a delay of 19 days prejudiced its fiscal planning capabilities. Despite all of these considerations, the appellate court failed even to mention prejudice to the city, examining instead only the "sparse nature of petitioners' showing."[198] Logic would seem to suggest that a sparse showing by plaintiff is better than no showing at all by the public entity.[199]

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191. Shaddox v. Melcher, 270 Cal. App. 2d 598, 600, 76 Cal. Rptr. 80, 82 (1969) (citations omitted).

192. *See* Viles v. State, 66 Cal. 2d 24, 28, 423 P.2d 818, 821, 56 Cal. Rptr. 666, 669 (1967), in which the court stated three possible reasons why the trial court could conceivably have denied relief:

> [If it found] (a) the plaintiff had not met the burden of proving that his failure to present his claim to the board within 100 days was through mistake, inadvertence, surprise or excusable neglect, or (b) that his failure did result from mistake but nevertheless the application to the board for permission to file a late claim was not made within a reasonable time not to exceed one year from the date of the accrual of the cause of action, or (c) that the failure to file on time was due to mistake but that the state established that it would be prejudiced by the late filing.

Two of the possible grounds for denying relief required no prejudice to the entity.

193. 12 Cal. App. 3d 116, 90 Cal. Rptr. 479 (1970).

194. *Id.* at 118, 90 Cal. Rptr. at 480.

195. *Id.*

196. In fact the trial court found that plaintiffs had submitted their late claim within a "reasonable time" after the 100-day period had expired. *Id.* at 119, 90 Cal. Rptr. at 481.

197. The trial court also found that the city would not have been prejudiced by the plaintiffs' late claim. *Id.*

198. *Id.* at 120, 90 Cal. Rptr. at 482.

199. See Tammen v. County of San Diego, 66 Cal. 2d 468, 426 P.2d 753, 58 Cal.

It seems apparent, then, that section 946.6 of the Government Code, as it is being applied, does not provide a hearing on the issue involved which satisfies procedural due process principles:

> The hearing required by the Due Process Clause must be "meaningful" and "appropriate to the nature of the case." It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard.[200]

It is submitted that if section 946.6 were amended to delete the required showing of mistake, inadvertence, surprise or reasonable neglect by plaintiff and to require courts to grant relief unless the public entity establishes prejudice in terms of the justifications advanced for the 100-day claim requirement, the just and compelling demands of due process would be satisfied.

CONCLUSION

Public entity claim statutes, long castigated as "traps for the unwary" plaintiff,[201] frequently achieve the lamentable result of barring an injured party from seeking compensation for his injuries because he has had the misfortune of sustaining them at the hands of a "governmental" or "public," rather than "private," tortfeasor. Because of their classifying effect, the statutes are susceptible to challenge on equal protection grounds, which require, at the very least, that a statute creating two classes and treating one of them adversely must have a "rational basis" for its existence. Although the California judiciary has been discouragingly unresponsive to such challenges to date,[202] the *Reed* line of decisions would appear to require that a more active standard of review be used to scrutinize the claim requirement. In the wake of the California Supreme Court's 1973 decision in *Brown v. Merlo*,[203] this should be particularly true in this state. Proper application of the *Reed* "substantial relationship" test should result in a finding that California's claim statutes, as presently written and applied, violate the fourteenth amendment's guarantee of equal protection of the law to those persons who are burdened by the requirements.

Substantive and procedural due process infirmities may also lurk within California's public entity claim law. Since the requirement is

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Rptr. 249 (1957); Clark v. City of Compton, 22 Cal. App. 3d 522, 99 Cal. Rptr. 613 (1971); and Shaddox v. Melcher, 270 Cal. App. 2d 598, 76 Cal. Rptr. 80 (1969), for other cases in which relief was denied without requiring a showing of prejudice.

200. Bell v. Burson, 402 U.S. 535, 541-42 (1971).

201. Stewart v. McCollister, 37 Cal. 2d 203, 207, 231 P.2d 48, 50 (1951).

202. See text accompanying notes 107-113 *supra*.

203. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

intertwined with statutes which impose liability on public entities, the Michigan court's substantive due process analysis in *Grubaugh v. City of St. Johns*[204] might be utilized to find that a cause of action against the government is a vested property right which is arbitrarily taken away from its owner by the claim requirement's operation. Realistically, this would appear to be an unlikely response from a judiciary that has consistently refused even to perform in-depth scrutiny of the more obvious equal protection problem. Procedural due process principles, however, may not be so easily ignored. The United States Supreme Court's findings of procedural due process infirmities in *Bell, Stanley, Vlandis, Murry,* and *LaFleur* grew out of the fact that the statute involved in each case irrebuttably presumed the existence of certain characteristics that were not necessarily true of the class of persons upon whom it imposed a burden. While the presumptions inherent in the claim statutes[205] may be said to be rebuttable in the late-claim[206] and relief-from-filing[207] proceedings authorized by statute, in practice they are not. The presence or absence of prejudice to the defendant, which is perhaps the most nearly legitimate of all the reasons given for curtailing the right of a "public" tortfeasor's victim to seek compensation, is very rarely considered by the courts in making their determinations.[208] Since this is the case, the claim statutes as applied might well be found violative of procedural due process guarantees.

The responsibility for rectifying the situation presently created by California's claim requirement lies with the legislature and the judiciary. The statutes, as written, reflect an earnest endeavor to ameliorate their potentially harsh impact by providing a late-claim procedure and an avenue for seeking judicial relief from the filing requirement, which may be followed when appeal to the defendant agency is of no avail. Perhaps improvement could be made, however, by redrafting the relief provision to more explicitly *require* courts to grant relief any time within a year from accrual of the cause of action, unless the defendant entity establishes prejudice in terms of the justifications advanced for the claim requirement. Alternatively, the judiciary could act on its own initiative to improve the present situation of the public tort victim by granting relief on a showing, however sparse, of mistake, inadvertence, surprise, or reasonable neglect, when no showing of prejudice is made by the governmental defendant.

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204. 384 Mich. 165, 180 N.W.2d 778 (1970).
205. See text accompanying notes 169-175 *supra.*
206. CAL. GOV'T CODE §§911.4, 911.6.
207. CAL. GOV'T CODE §946.6.
208. See text accompanying notes 186-200 *supra.*

Some improvement of the lot of the "public" tortfeasor's victim is imperative. As the law presently stands, it is a tangled thicket which all dread to enter and from which few emerge unscathed.

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